

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

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In the Matter of the Application
for the Appointment of a Guardian of
the Person and/or Property of

Index No. _____

REPORT OF
COURT EVALUATOR¹

A Person Alleged To Be Incapacitated.

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TO THE SUPREME COURT OF THE STATE OF NEW YORK:

I, _____, an attorney at law licensed to practice in the state of New York, having been appointed as Court Evaluator in this proceeding, respectfully report to the Court as follows:

1. I was duly appointed as Court Evaluator in this proceeding by Order of the Honorable _____ on [date].

2. I duly filed the Statement of Compliance and Statement of Appointment.

3. I was served with and received a complete copy of the Order of the Honorable _____ and the papers upon which said Order was based. I ascertained that I had no adverse interest or conflict with the aforementioned "alleged incapacitated person" ("AIP"), _____, nor was I related to, nor connected in business with any party in this proceeding, or the attorney for any party in the proceeding, nor was I entitled to share in the estate and property in which the AIP has any interest.

4. Therefore, I duly qualified as Court Evaluator to protect the rights and interests of the AIP, by executing, serving, and filing my Consent and Affidavit of Responsibility with the Court.²

5. On [date], I met with _____, the ("AIP") at her home at [Address]. [GIVE FULL DETAILS IN REPORT. Provide details of visit with AIP, whether at home, nursing home, hospital, etc.; what was discussed; the AIP's responses; living arrangements; the questions posed of the AIP and the responses; the attentiveness. Indicate if AIP understood this proceeding; if AIP knew names of relatives listed in Petition, date of birth, where she lives, extent of assets; if AIP understands her surroundings, etc. If at a nursing home or hospital or facility, describe the surrounding facility, the type of facility, etc.; if at home, indicate

¹ NOTE: This is a *sample* report, which may contain some inconsistent provisions. It is reproduced here only as an example.

² NOTE: May not be needed and *not provided for in statute*.

discussions with home care person, if any, regarding the background, how long they are working there, their hours and days, who visits, etc. Indicate discussions with social worker, at the hospital or other facility; discussions with the nurse, hospital staff, etc.; inquire who visits, which relatives are attentive to the situation; who is closely involved with the care and concern for the AIP, etc.]

6. I contacted and spoke with the following relatives: [Provide information and details, the family tree, close relationship between the AIP; if there are no close relatives, what is the relationship between the AIP and the Proposed Guardian; who is close in proximity to the AIP; when was the last time they visited; was the AIP ever married; does the AIP have any children, etc. Obtain full details regarding the entire family background.]

7. I had discussions with and contacted Dr. _____, the family physician. The following is reported: [Provide details.] I also discussed this with Dr. _____ at the hospital and the following information was provided: [Give details.] I have also been informed that the AIP is under the following medication: [List medications.] The AIP is receiving the following therapy: [Give details.] It is indicated to me the prognosis is: [Provide details.]

8. I interviewed and met with _____, the proposed guardian, a [relation to the AIP] of the AIP. I discussed the situation and the relationship between the proposed guardian and the AIP; when do they visit; what have they done to assist the AIP currently, etc. [Indicate details of education and financial background of the proposed guardian, etc. Provide details of discussions regarding the proposed plan and the duties and responsibilities of a guardian and a fiduciary.]

9. The assets of the AIP have been independently investigated and confirmed by me.

- (a) She receives Social Security in the sum of \$_____ per month which is automatically deposited in her account at _____; her pension from _____ is \$_____ per month (etc.).
- (b) I have confirmed the assets. I have written to each of the banks separately, and the assets that I have confirmed to date are [list banks, addresses, accounts numbers and balance, etc.]
- (c) There are several joint accounts in the name of the AIP and [indicate details].
- (d) There is a Totten trust account in the name of the AIP, in trust for [provide details].

[NOTE: It is necessary that the joint accounts and Totten trust accounts be indicated separately and specifically—banks generally will *not* release funds in a Totten trust account or joint account to the guardian unless there is consent of the joint owner or beneficiary, or unless there is a Court Order directing them to do so; regarding a joint account, some banks may release up to 1/2 of the funds, but may also insist on a Court Order].

- (e) [Include information regarding all other assets, etc.]

- (f) She is entitled to receive alimony from her divorced husband in the amount of \$_____ per month. Her former husband had not made his monthly payments for several months.
- (g) Her uncle recently died, and she is listed as a residuary legatee in addition to other specific legacies. [Provide full details.]

10. As part of my duties, I wish to report to the Court information in response to the seventeen questions provided in MHL § 81.09(c)(5):

(1) I explained to the AIP the proceeding and the proposed appointment of a guardian and the powers proposed. In my opinion she did not fully understand, and did not indicate if she agrees or if she opposes this.

(2) I inquired if she wished to have legal counsel appointed and she said she didn't think it was necessary. In fact she said she didn't even know why she was being bothered with all these papers. I do not believe it is necessary to appoint legal counsel.

(3), (4), and (5) In my opinion, _____ can come to the Courthouse for the hearing. It will be necessary that an ambulette be hired along with a nurse's aide but she can physically come to the hearing and participate, although she indicated to me she didn't want to come to Court. If she refuses to come to the Courthouse for the hearing, then the hearing will have to be held in her house.

(6) There are some resources that would be sufficient and reliable to provide for some personal needs or property management; however, I still believe it is necessary that a guardian be appointed [Provide details.]

(7) I tried to discuss with _____ her activities of daily living. Although she is able to manage some activities of daily living, she certainly cannot manage all. For instance, she is able to go to the supermarket which is right next door to her building, but she gets lost when she goes to the bank, which is only one block away.

In addition, she keeps forgetting to go to her doctor and misses appointments and sometimes gets lost while going to the doctor whose office is around the corner. She does need regular medical attention; she has [Provide details of illness and disability, etc.]. She must visit her doctor on a regular basis and it is necessary that she have a home care attendant with her to assist in accompanying her for her medical appointments.

I reviewed her medical records obtained pursuant to a Court Order, and have reviewed the psychiatric examination of Dr. _____. I noticed she is taking a great deal of medication and has been taking psychotropic drugs and medication for several years. There is a possibility there are adverse interactions with the other medication she is taking, which produces adverse side effects. This should be evaluated by a doctor. [Provide further details.]

(8) I tried to explain to _____ the concerns for her to go for medical attention; she said that she is taking care of it. I do not believe she understands the consequences of her inability to manage activities of daily living.

There are also concerns in that her dividend checks are not being deposited into the bank regularly; in fact, many of them may be lost, as in the apartment there were piles and piles of papers—current mail with old mail from a year or two years ago; interspersed with these papers were some dividend checks and tax notices and financial records. There was a turn-off notice from the telephone company among these papers.

I tried to explain to her the necessity and importance of taking care of these financial records, and she indicated that she will do this later, that she has been taking care of it. I do not believe she understands and appreciates the consequences of her inability to manage these activities.

(9) I confirmed the various assets and have written to each of the companies where she allegedly owns shares of stock and have also written to each bank independently to confirm the specific amounts; I wish to report to the Court the following: [List all bank accounts and addresses, account number, amounts, names of companies where stock is owned and other securities, number of shares and approximate valuation and all other financial information obtained.]

(10) I have discussed with her if she has any preferences and wishes with regard to managing activities of daily living. She insists she does not want a 24-hour home care worker because she does not want someone around the house 24 hours a day. She said they interfere with her and bother her. Other than that, she did not indicate any preferences or wishes, but indicated she did not want people bothering her.

(11) I have investigated and inquired if she ever signed a power of attorney. She has signed a power of attorney, naming her sister _____ as her agent. There is a strong possibility that _____ has transferred title of some of the bank accounts to benefit herself and her children. [Provide details of investigation.]

From all records that I could locate, and my investigation, I do not believe she has signed a DNR Order, Health Care Proxy or Living Will.

(12) and (13) In my opinion, the least restrictive form of intervention and the powers proposed for the guardian are as follows: to marshal her assets, pay all of her bills, provide for prudent investments, to continue to provide the support for her disabled son who is a resident of _____.

(a) From my investigation, she has been providing support of \$1,000 per month to her disabled son for the past ten years; in my opinion, she should continue to provide this support, if she continues to have sufficient resources and income to meet her own needs, and has funds available. She told me her son was in an accident and has been disabled for the past ten years. [Provide information, etc.] When I spoke to her about this, she indicated she wanted to continue providing support for him, that he needed the money, and she has been doing this all of her life.

(b) In addition, the guardian should have the authority to retain legal counsel and institute legal proceedings against _____'s ex-husband, if necessary. [Provide details.] [However, payment of legal counsel cannot be made until approved by the Court.]

(c) The guardian should also have authority to retain legal counsel to protect _____'s rights to the inheritance from her uncle's estate, along with the right to commence proceedings in the Surrogate's Court, if necessary. [However, payment to legal counsel should not be made until approved by the Court.] [Provide details of the estate of the uncle, etc.]

(d) The guardian should be authorized to commence discovery proceedings to ascertain if any assets have been misappropriated. [Include details.]

(e) [Include provisions regarding the joint accounts and Totten trust accounts, if the co-owner and beneficiary have been served with notice of the proceedings.]

(f) In addition, regarding powers for personal needs, these should include the following: [Include powers].

(g) I believe it is necessary there be a restriction so that the guardian is not permitted to place _____ in a nursing home or residential facility so long as it is possible to maintain _____ in the community and in her own home (even if _____ agrees). Should there be a later time when nursing home placement is necessary, the guardian should be required to make application before the Court at a hearing with advance notice to _____ and a Court Evaluator.

(14) I object to the choice of the proposed guardian, as I believe that the proposed guardian has a conflict of interest because [Indicate details and reasons]. In addition, there is concern as to how she has been utilizing the power of attorney; she has never provided copies of all the transactions to me, even though I requested them and she promised to send them. She sent some records to me, but not all. There appear to be several discrepancies and several titles to bank accounts that have not been fully explained.

Based on my investigation to date, it appears that _____ may not have been properly using the power of attorney. The Court should therefore consider vacating the power of attorney; although it is not clear if, at the time the power of attorney was granted, whether or not _____, the AIP, was incapacitated, I believe, based on recent case law, there is authority for a Court to vacate a power of attorney.

(15) In my opinion, there are potential conflicts of interest between the various family members, as it seems her sisters and brothers are always arguing with each other and are arguing with _____, the proposed guardian.

(16) As indicated in (14) and (15) above, there are potential conflicts of interest. In addition, it appears that all the sisters and brothers are legatees under the will of Alex Smith (an uncle), and they were all devised jointly a piece of real property. [Provide further details.] It will be necessary that _____'s rights and interests be protected in this estate proceeding,

and the guardian should have the authority to retain legal counsel in the probate proceeding, if necessary.

(17) My investigation has revealed that _____ has had an attorney for many years: [name and address]; and even though she has not had recent contact with her attorney, I believe the attorney should be notified. In my opinion, there are no additional persons who should be given notice of this proceeding.

This is my Interim Report. I am hopeful that by the time of the Hearing and thereafter, I will be able to obtain more information for the Court and will submit my Final Report accordingly.

Dated: _____, New York
_____, _____

Respectfully Submitted,

[Name of Court Evaluator]
Court Evaluator